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6 **IN THE UNITED STATES DISTRICT COURT**

7 **FOR THE DISTRICT OF ARIZONA**

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9 Frank Mendez,) No. CV 11-026-PHX-JAT (LOA)

10 Plaintiff,) **ORDER**

11 vs.)

12 Charles Ryan, et al.,)

13 Defendants.)

14

15 Plaintiff Frank Mendez, who is confined in the Arizona State Prison Complex-Eyman,

16 has filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and paid the filing fee.

17 The Court will dismiss the Complaint with leave to amend.

18 **I. Statutory Screening of Prisoner Complaints**

19 The Court is required to screen complaints brought by prisoners seeking relief against

20 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.

21 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised

22 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may

23 be granted, or that seek monetary relief from a defendant who is immune from such relief.

24 28 U.S.C. § 1915A(b)(1), (2).

25 A pleading must contain a “short and plain statement of the claim *showing* that the

26 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not

27 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-

28 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

1 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
2 statements, do not suffice.” Id.

3 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a
4 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,
5 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content
6 that allows the court to draw the reasonable inference that the defendant is liable for the
7 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for
8 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
9 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual
10 allegations may be consistent with a constitutional claim, a court must assess whether there
11 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

12 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
13 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
14 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
15 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
16 94 (2007) (*per curiam*)).

17 If the Court determines that a pleading could be cured by the allegation of other facts,
18 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the
19 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court
20 should not, however, advise the litigant how to cure the defects. This type of advice “would
21 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,
22 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was
23 required to inform a litigant of deficiencies). Plaintiff’s Complaint will be dismissed for
24 failure to state a claim, with leave to amend because the Complaint may possibly be saved
25 by amendment.

26 **II. Complaint**

27 Plaintiff names the following Defendants in the Complaint: Arizona Department of
28 Corrections (ADOC) Director Charles Ryan, Security Operations Officer Therese Schroeder,

1 General Counsel for ADOC Karyn Klausner, SSU/STG Coordinator R. Yesenski, Deputy
 2 Warden P. Rider, Deputy Warden M. Muste, Deputy Warden J. Jackson, C.O. II C. Lazaro,
 3 and Former Warden Jerry Sterns.

4 Plaintiff raises one claim for relief in which he claims that his Sixth, Eighth, and
 5 Fourteenth Amendment rights were violated when he was validated as a Security Threat
 6 Group (“STG”) member and transferred to SMU without due process. Specifically, Plaintiff
 7 alleges that he was not provided with proper Notice of the STG proceedings, was not allowed
 8 time to consider the evidence against him before the STG hearing, and was denied the
 9 opportunity to call witnesses or present evidence. Plaintiff further alleges that his retained
 10 counsel was not allowed to effectively represent him during the STG appeals process.

11 Plaintiff seeks injunctive relief and costs. Plaintiff also seeks to be credited with all
 12 good time or earned release credits that he would have accrued had he not been validated as
 13 part of an STG.

14 **III. Failure to State a Claim**

15 In analyzing a due process claim, the Court must first decide whether Plaintiff was
 16 entitled to any process, and if so, whether he was denied any constitutionally required
 17 procedural safeguard. Liberty interests which entitle an inmate to due process are “generally
 18 limited to freedom from restraint which, while not exceeding the sentence in such an
 19 unexpected manner as to give rise to protection by the Due Process Clause of its own force,
 20 nonetheless imposes atypical and significant hardship on the inmate in relation to the
 21 ordinary incidents of prison life.” Sandin v. Conner, 515 U.S. 472, 484 (1995) (internal
 22 citations omitted).

23 To determine whether an inmate is entitled to the procedural protections afforded by
 24 the Due Process Clause, the Court must look to the particular restrictions imposed and ask
 25 whether they “‘present the type of atypical, significant deprivation in which a state might
 26 conceivably create a liberty interest.’” Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995)
 27 (quoting Sandin, 515 U.S. at 486). “Atypicality” requires not merely an empirical
 28 comparison, but turns on the importance of the right taken away from the prisoner. See Carlo

1 v. City of Chino, 105 F.3d 493, 499 (9th Cir. 1997). To determine whether the sanctions are
 2 atypical and a significant hardship, courts look to prisoner's conditions of confinement, the
 3 duration of the sanction, and whether the sanction will affect the duration of the prisoner's
 4 sentence. See Keenan v. Hall, 83 F.3d 1083, 1088-89 (9th Cir. 1996).

5 In this case, Plaintiff has not alleged that he is subjected to atypical or significant
 6 hardships; he has simply made a conclusory allegation that he was placed in a "super-max"
 7 facility based on his STG validation. See Sandin, 515 U.S. at 475-76, 487 (30 days'
 8 disciplinary segregation is not atypical and significant); Smith v. Mensinger, 293 F.3d 641,
 9 654 (3rd Cir. 2002) (seven months of disciplinary confinement "does not, on its own, violate
 10 a protected liberty interest"); Jones v. Baker, 155 F.3d 810 (6th Cir. 1998) (two and one-half
 11 years' administrative segregation is not atypical and significant); Rizzo v. Dawson, 778 F.2d
 12 527, 530 (9th Cir. 1985) (prison authorities may change a prisoner's "place of confinement
 13 even though the degree of confinement may be different and prison life may be more
 14 disagreeable in one institution than in another" without violating a prisoner's due process
 15 rights); Lucero v. Russell, 741 F.2d 1129 (9th Cir. 1984) (administrative transfer to
 16 maximum security without a hearing does not infringe on any protected liberty interest).

17 Without allegations regarding specific conditions of Plaintiff's confinement, Plaintiff
 18 has failed to state a due process claim. In the Complaint, Plaintiff relies on Wilkinson v.
 19 Austin, 545 U.S. 209, 226 (2005) for the assertion that "super max placement triggered
 20 federal constitutional due process protections." This is only partially correct. In Wilkinson,
 21 the Supreme Court analyzed the specific conditions of confinement to which inmates in that
 22 action were subjected and determined that, under Sandin, due process protections were
 23 warranted. The Supreme Court did not determine that *any* placement in a high security
 24 facility would automatically trigger due process protections. Accordingly, Plaintiff has failed
 25 to state a claim.

26 **B. Good Time or Early Release Credits**

27 "[W]hen a state prisoner is challenging the very fact or duration of his physical
 28 imprisonment, and the relief he seeks is a determination that he is entitled to immediate

1 release or a speedier release from that imprisonment, his sole remedy is a writ of habeas
 2 corpus.” Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) (holding that an injunctive relief
 3 action to restore the revocation of good-time credits is not cognizable under § 1983); see also
 4 Simpson v. Thomas, 528 F.3d 685, 692-93 (9th Cir. 2008).

5 Accordingly, Plaintiff’s claims for restoration of his good time or early release credits
 6 are not appropriately raised in a § 1983 action and must be dismissed.

7 **IV. Leave to Amend**

8 For the foregoing reasons, Plaintiff’s Complaint will be dismissed for failure to state
 9 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit a first
 10 amended complaint to cure the deficiencies outlined above. The Clerk of Court will mail
 11 Plaintiff a court-approved form to use for filing a first amended complaint. If Plaintiff fails
 12 to use the court-approved form, the Court may strike the amended complaint and dismiss this
 13 action without further notice to Plaintiff.

14 If Plaintiff files an amended complaint, Plaintiff must write short, plain statements
 15 telling the Court: (1) the constitutional right Plaintiff believes was violated; (2) the name of
 16 the Defendant who violated the right; (3) exactly what that Defendant did or failed to do;
 17 (4) how the action or inaction of that Defendant is connected to the violation of Plaintiff’s
 18 constitutional right; and (5) what specific injury Plaintiff suffered because of that
 19 Defendant’s conduct. See Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976).

20 Plaintiff must repeat this process for each person he names as a Defendant. If Plaintiff
 21 fails to affirmatively link the conduct of each named Defendant with the specific injury
 22 suffered by Plaintiff, the allegations against that Defendant will be dismissed for failure to
 23 state a claim. Conclusory allegations that a Defendant or group of Defendants have violated
 24 a constitutional right are not acceptable and will be dismissed.

25 Plaintiff must clearly designate on the face of the document that it is the “First
 26 Amended Complaint.” The first amended complaint must be retyped or rewritten in its
 27 entirety on the court-approved form and may not incorporate any part of the original
 28 Complaint by reference. **Plaintiff may include only one claim per count.**

A first amended complaint supersedes the original complaint. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will treat an original complaint as nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in the original complaint is waived if it is not raised in a first amended complaint. King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

V. Warnings

A. Address Changes

Plaintiff must file and serve a notice of a change of address in accordance with Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other relief with a notice of change of address. Failure to comply may result in dismissal of this action.

B. Copies

Plaintiff must submit an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice to Plaintiff.

C. Possible “Strike”

Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails to file an amended complaint correcting the deficiencies identified in this Order, the dismissal may count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner may not bring a civil action or appeal a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

D. Possible Dismissal

If Plaintiff fails to timely comply with every provision of this Order, including these

1 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at
2 1260-61 (a district court may dismiss an action for failure to comply with any order of the
3 Court).

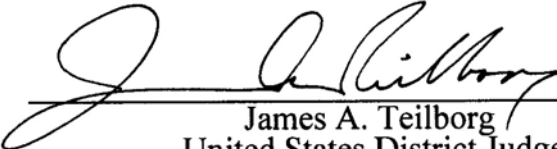
4 **IT IS ORDERED:**

5 (1) The Complaint (Doc. 1) is **dismissed** for failure to state a claim. Plaintiff has
6 **30 days** from the date this Order is filed to file a first amended complaint in compliance with
7 this Order.

8 (2) If Plaintiff fails to file an amended complaint within 30 days, the Clerk of
9 Court must, without further notice, enter a judgment of dismissal of this action with prejudice
10 that states that the dismissal may count as a “strike” under 28 U.S.C. § 1915(g).

11 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil
12 rights complaint by a prisoner.

13 DATED this 16th day of February, 2011.

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17 James A. Teilborg
18 United States District Judge
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**Instructions for a Prisoner Filing a Civil Rights Complaint
in the United States District Court for the District of Arizona**

1. Who May Use This Form. The civil rights complaint form is designed to help incarcerated persons prepare a complaint seeking relief for a violation of their federal civil rights. These complaints typically concern, but are not limited to, conditions of confinement. **This form should not be used to challenge your conviction or sentence.** If you want to challenge a state conviction or sentence, you should file a petition under 28 U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. If you want to challenge a federal conviction or sentence, you should file a motion under 28 U.S.C. § 2255 to vacate sentence in the federal court that entered the judgment.
2. The Form. **Local Rule of Civil Procedure (LRCiv) 3.4(a) provides that complaints by incarcerated persons must be filed on the court-approved form.** The form must be typed or neatly handwritten. The form must be completely filled in to the extent applicable. All questions must be answered clearly and concisely in the appropriate space on the form. If needed, you may attach additional pages, **but no more than fifteen additional pages**, of standard letter-sized paper. You must identify which part of the complaint is being continued and number all pages. If you do not fill out the form properly, you will be asked to submit additional or corrected information, which may delay the processing of your action. You do not need to cite law.
3. Your Signature. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. The Filing Fee. The filing fee for this action is \$350.00. If you are unable to immediately pay the filing fee, you may request leave to proceed *in forma pauperis*. Please review the “Information for Prisoners Seeking Leave to Proceed with a (Non-Habeas) Civil Action in Federal Court *In Forma Pauperis* Pursuant to 28 U.S.C. § 1915” for additional instructions.
5. Original and Judge’s Copy. You must send an **original plus one copy** of your complaint and of any other documents submitted to the Court. You must send one additional copy to the Court if you wish to have a file-stamped copy of the document returned to you. All copies must be identical to the original. Copies may be legibly handwritten.
6. Where to File. You should file your complaint in the division **where you were confined when your rights were allegedly violated.** See LRCiv 5.1(a) and 77.1(a). If you were confined in Maricopa, Pinal, Yuma, La Paz, or Gila County, file in the Phoenix Division. If you were confined in Apache, Navajo, Coconino, Mohave, or Yavapai County, file in the Prescott Division. If you were confined in Pima, Cochise, Santa Cruz, Graham, or Greenlee County, file in the Tucson Division. **Mail the original and one copy of the complaint with the \$350 filing fee or the application to proceed *in forma pauperis* to:**

Phoenix & Prescott Divisions:
U.S. District Court Clerk
U.S. Courthouse, Suite 130
401 West Washington Street, SPC 10
Phoenix, Arizona 85003-2119

OR

Tucson Division:
U.S. District Court Clerk
U.S. Courthouse, Suite 1500
405 West Congress Street
Tucson, Arizona 85701-5010

7. Change of Address. You must immediately notify the Court and the defendants in writing of any change in your mailing address. **Failure to notify the Court of any change in your mailing address may result in the dismissal of your case.**

8. Certificate of Service. You must furnish the defendants with a copy of any document you submit to the Court (except the initial complaint and application to proceed *in forma pauperis*). Each original document (except the initial complaint and application to proceed *in forma pauperis*) must include a certificate of service on the last page of the document stating the date a copy of the document was mailed to the defendants and the address to which it was mailed. See Fed. R. Civ. P. 5(a), (d). Any document received by the Court that does not include a certificate of service may be stricken. A certificate of service should be in the following form:

I hereby certify that a copy of the foregoing document was mailed
this _____ (month, day, year) to:

Name: _____

Address: _____

Attorney for Defendant(s)

(Signature)

9. Amended Complaint. If you need to change any of the information in the initial complaint, you must file an amended complaint. The amended complaint must be written on the court-approved civil rights complaint form. You may file one amended complaint without leave (permission) of Court before any defendant has answered your original complaint. See Fed. R. Civ. P. 15(a). After any defendant has filed an answer, you must file a motion for leave to amend and lodge (submit) a proposed amended complaint. LRCiv 15.1. In addition, an amended complaint may not incorporate by reference any part of your prior complaint. LRCiv 15.1(a)(2). **Any allegations or defendants not included in the amended complaint are considered dismissed.** All amended complaints are subject to screening under the Prison Litigation Reform Act; screening your amendment will take additional processing time.

10. Exhibits. You should not submit exhibits with the complaint or amended complaint. Instead, the relevant information should be paraphrased. You should keep the exhibits to use to support or oppose a motion to dismiss, a motion for summary judgment, or at trial.

11. Letters and Motions. It is generally inappropriate to write a letter to any judge or the staff of any judge. The only appropriate way to communicate with the Court is by filing a written pleading or motion.

12. Completing the Civil Rights Complaint Form.

HEADING:

1. Your Name. Print your name, prison or inmate number, and institutional mailing address on the lines provided.
2. Defendants. If there are **four or fewer** defendants, print the name of each. If you name **more than four** defendants, print the name of the first defendant on the first line, write the words “and others” on the second line, and attach an additional page listing the names of **all** of the defendants. Insert the additional page after page 1 and number it “1-A” at the bottom.
3. Jury Demand. If you want a jury trial, you must write “JURY TRIAL DEMANDED” in the space below “CIVIL RIGHTS COMPLAINT BY A PRISONER.” Failure to do so may result in the loss of the right to a jury trial. A jury trial is not available if you are seeking only injunctive relief.

Part A. JURISDICTION:

1. Nature of Suit. Mark whether you are filing the complaint pursuant to 42 U.S.C. § 1983 for state, county, or city defendants; “Bivens v. Six Unknown Federal Narcotics Agents” for federal defendants; or “other.” If you mark “other,” identify the source of that authority.
2. Location. Identify the institution and city where the alleged violation of your rights occurred.
3. Defendants. Print all of the requested information about each of the defendants in the spaces provided. If you are naming more than four defendants, you must provide the necessary information about each additional defendant on separate pages labeled “2-A,” “2-B,” etc., at the bottom. Insert the additional page(s) immediately behind page 2.

Part B. PREVIOUS LAWSUITS:

You must identify any other lawsuit you have filed in either state or federal court while you were a prisoner. Print all of the requested information about each lawsuit in the spaces provided. If you have filed more than three lawsuits, you must provide the necessary information about each additional lawsuit on a separate page. Label the page(s) as “2-A,” “2-B,” etc., at the bottom of the page and insert the additional page(s) immediately behind page 2.

Part C. CAUSE OF ACTION:

You must identify what rights each defendant violated. The form provides space to allege three separate counts (**one violation per count**). If you are alleging more than three counts, you must provide the necessary information about each additional count on a separate page. Number the additional pages “5-A,” “5-B,” etc., and insert them immediately behind page 5. Remember that you are limited to a total of fifteen additional pages.

1. **Counts.** You must identify which civil right was violated. **You may allege the violation of only one civil right per count.**
2. **Issue Involved.** Check the box that most closely identifies the issue involved in your claim. **You may check only one box per count.** If you check the box marked “Other,” you must identify the specific issue involved.
3. **Supporting Facts.** After you have identified which civil right was violated, you must state the supporting facts. Be as specific as possible. You must state what each individual defendant did to violate your rights. If there is more than one defendant, you must identify which defendant did what act. You also should state the date(s) on which the act(s) occurred, if possible.
4. **Injury.** State precisely how you were injured by the alleged violation of your rights.
5. **Administrative Remedies.** You must exhaust any available administrative remedies before you file a civil rights complaint. See 42 U.S.C. § 1997e. Consequently, you should disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided.

Part D. REQUEST FOR RELIEF:

Print the relief you are seeking in the space provided.

SIGNATURE:

You must sign your name and print the date you signed the complaint. Failure to sign the complaint will delay the processing of your action. Unless you are an attorney, you may not bring an action on behalf of anyone but yourself.

FINAL NOTE

You should follow these instructions carefully. Failure to do so may result in your complaint being stricken or dismissed. All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number the pages.

B. DEFENDANTS

1. Name of first Defendant: _____. The first Defendant is employed as:
 _____ at _____.
 (Position and Title) (Institution)
2. Name of second Defendant: _____. The second Defendant is employed as:
 _____ at _____.
 (Position and Title) (Institution)
3. Name of third Defendant: _____. The third Defendant is employed as:
 _____ at _____.
 (Position and Title) (Institution)
4. Name of fourth Defendant: _____. The fourth Defendant is employed as:
 _____ at _____.
 (Position and Title) (Institution)

If you name more than four Defendants, answer the questions listed above for each additional Defendant on a separate page.

C. PREVIOUS LAWSUITS

1. Have you filed any other lawsuits while you were a prisoner? ☐ Yes ☐ No
2. If yes, how many lawsuits have you filed? _____. Describe the previous lawsuits:
 - a. First prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - b. Second prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____
 - c. Third prior lawsuit:
 1. Parties: _____ v. _____
 2. Court and case number: _____
 3. Result: (Was the case dismissed? Was it appealed? Is it still pending?) _____

If you filed more than three lawsuits, answer the questions listed above for each additional lawsuit on a separate page.

COUNT III

- [illegible]

If you assert more than three Counts, answer the questions listed above for each additional Count on a separate page.

E. REQUEST FOR RELIEF

State the relief you are seeking:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
DATE

SIGNATURE OF PLAINTIFF

(Name and title of paralegal, legal assistant, or
other person who helped prepare this complaint)

(Signature of attorney, if any)

(Attorney's address & telephone number)

ADDITIONAL PAGES

All questions must be answered concisely in the proper space on the form. If you need more space, you may attach no more than fifteen additional pages. But the form must be completely filled in to the extent applicable. If you attach additional pages, be sure to identify which section of the complaint is being continued and number all pages.